IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-815

RAMON R. APPAWORA, *Appellant*,

v.

MYRON BROUGH, *Appellee*.

Appeal from the Supreme Court of the State of Utah

BRIEF OF THE STATE OF UTAH, AMICUS CURIAE, IN SUPPORT OF APPELLEE

H. WRIGHT VOLKER
Assistant Attorney General
State of Utah
State Capitol Building
Salt Lake City, Utah

EARL R. METTLER
Special Assistant Attorney General
State of Utah
231 C Street, N.E.
Washington, D. C.

Attorneys for Amicus Curiae

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

15542-2-77

TABLE OF CONTENTS

	Page
Opinions Below	1
Jurisdiction	1
Statutes Involved	1
Statement of the Case	2
Question Presented	5
Argument	6
I. The Court Below Correctly Held that the Area in Question Is No Longer Within Reservation Boundaries	6
A. The Uintah Reservation Was Expressly Partially Disestablished by Acts of Congress	6
B. The Surrounding Circumstances and Legislative History Confirm the Congressional Intent To Disestablish	11
C. The Reservation Boundaries Were Disestablished on the Date the Reservation Was Proclaimed Opened to Settlement by Presidential Proclamation	14
D. The Plenary Power of Congress, as Recognized by This Court, Authorized the Disestablishing Legislation	18
II. The Questions Which Appellant Claims Are Raised in This Appeal Are Not, in Fact, Presented	19
III. The Decision Below Is Not Properly Subject to Appeal to This Court	23
Conclusion	24

TABLE OF CITATIONS

Cases:	Page
Ash Sheep Co. v. United States, 252 U.S. 159 (1920)	15-16
Blackfeather v. United States, 190 U.S. 368 (1903)	18
Board of Commissioners v. Seber, 318 U.S. 705 (1946)	18
Cherokee Nation v. Hitchcock, 187 U.S. 294 (1902)	18
Choate v. Trapp, 224 U.S. 665 (1912)	18
DeCoteau v. District County Court, 420 U.S. 425 (1975)	*passim*
Garrity v. State of New Jersey, 385 U.S. 493 (1967)	23
Kennerly v. District Court of Montana, 400 U.S. 423 (1971)	5
Lonewolf v. Hitchcock, 187 U.S. 553 (1903)	7, 18, 19
Mattz v. Arnett, 412 U.S. 481 (1973)	3, 10, 11, 14, 24
McClanahan v. Arizona Tax Commission, 411 U.S. 164 (1973)	5
Moe v. Confederated Salish & Kootenai Tribes, 425 U.S. 463 (1976)	3
Roff v. Burney, 168 U.S. 218 (1897)	18
Rosebud Sioux Tribe v. Kneip, 521 F.2d 87 (8th Cir. 1975) cert. granted, 425 U.S. 989	15
Seymour v. Superintendent, 368 U.S. 35 (1962)	3, 11, 14
Stephens v. Cherokee Nation, 174 U.S. 445 (1899) (16)	18
Uintah & White River Bands of Ute Indians v. United States, 139 Ct. Cl. 1, 2-3 (1957)	8
United States ex rel. Feather v. Erickson, 420 U.S. 425 (1975)	3
United States v. Creek Nation, 295 U.S. 103 (1935)	16
United States v. La Plant, 200 F. 92 (D.S. D. 1911)	17
United States v. Pelican, 232 U.S. 442 (1913)	17
United States v. Southern Pacific Transportation Co., 543 F. 2d 676 (9th Cir. 1976)	16
Ute Indian Tribe v. State of Utah, et al., Civil No. C-75-408 (U.S. Dist. Ct., Utah)	3, 4
Ute Indian Tribe v. Utah State Tax Commission, No. 76-1602	2, 3, 11
Williams v. Lee, 358 U.S. 217 (1959)	5
Wilson v. Cook, 327 U.S. 474 (1946)	23

Federal Statutes:	Page
18 U.S.C. 1151	17, 20
25 U.S.C. 1321-1326	20, 21, 23
28 U.S.C. 1257	23
28 U.S.C. 2103	23
Acts of Congress:	
Act of June 15, 1880, 21 Stat. 199	6
Act of May 5, 1864, 13 Stat. 63	6
Act of February 8, 1887, 24 Stat. 388	11
Act of August 5, 1894, 28 Stat. 286, 337	7, 15
Act of June 7, 1897, 30 Stat. 62, 87	6
Act of June 4, 1898, 30 Stat. 429	7
Act of March 1, 1899, 30 Stat. 924, 940	6, 17
Act of May 27, 1902, 32 Stat. 262, 263	*passim*
Act of March 3, 1903, 32 Stat. 982	6, 7, 12, 13, 19
Act of April 27, 1904, 33 Stat. 352, 359, 360	16
Act of June 21, 1906, 34 Stat. 325, 375	7
Act of April 30, 1908, 35 Stat. 70, 95	6, 7
Act of April 4, 1910, 36 Stat. 269, 285	7
Act of March 3, 1911, 36 Stat. 1058, 1074	7
Act of July 20, 1912, 37 Stat. 196	7
Act of May 14, 1920, 41 Stat. 599	7
Act of June 18, 1934, 48 Stat. 484	18
Act of March 11, 1948, 62 Stat. 72	6, 8, 9, 10
Congressional Records:	
30 Cong. Rec. (1897)	7
31 Cong. Rec. (1898)	15
36 Cong. Rec. (1903)	12, 13
H. R. Rep. No. 660, 53rd Cong., 2nd Sess. (1894)	11
H. R. Rep. No. 1372, 80th Cong., 2nd Sess. (1948)	9
S. Doc. No. 32, 55th Cong., 1st Sess. (1897)	7
S. Doc. No. 212, 57th Cong., 1st Sess. (1902)	12, 18-19
Joint Resolution No. 31, June 19, 1902, 32 Stat. 744	8
Presidential Proclamations and Executive Orders:	
Executive Order of January 5, 1882, 1 Kappler 901	6
Proclamation of July 14, 1905, 34 Stat. 3119	*passim*

Page

OTHER AUTHORITIES:

56 Interior Department Opinions 330 (1938) 18

OTHER STATUTES & ORDINANCES:

Section 63-36-9 through 18, Utah Code Annotated (1953) 21

Section 1-2-3, Law and Order Code of the Ute Indian Tribe 4

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-815

RAMON R. APPAWORA, *Appellant,*

v.

MYRON BROUGH, *Appellee.*

Appeal from the Supreme Court of the State of Utah

BRIEF OF THE STATE OF UTAH, AMICUS CURIAE, IN SUPPORT OF APPELLEE

The State of Utah, *amicus curiae,* concurs in and adopts the statement of Opinions Below contained in the Jurisdictional Statement. *Amicus* contests that jurisdiction lies by appeal to this Court, as set forth in Part III of the Argument herein. *Amicus* concurs in and adopts the Statutes and Constitutional Provisions Involved as set forth in the Jurisdictional Statement, except that it contests the relevance of some of the laws included therein, as set forth in Part II of the Argument herein.

STATEMENT

This case reflects a current attempt by the Ute Indian Tribe of the Uintah and Ouray Reservation in Utah to obtain jurisdiction over an area of approximately three million acres that is within the original boundaries of two former reservations which were disestablished around the turn of the century. Appellant is represented by the law firm which has represented the Ute Tribe for decades and presently represents the Tribe in two federal lawsuits against the State of Utah which also advocate the re-establishment of original reservation boundaries.

Because this action arose in the context of a tort action between two private individuals, the State was not a party to the action in the courts below. However, the State has a vital interest in the question presented, and is, as noted, presently a party in two other lawsuits involving the same issue.

The court below ruled that the area in which the automobile accident involved herein had occurred was no longer Indian country and no longer within an Indian reservation because it had been restored to the public domain by an Act of Congress and Presidential Proclamation. Jurisdictional Statement, A3-A5.

In *Ute Indian Tribe* v. *Utah State Tax Commission,* No. 76-1602, decided by the United States District Court for the District of Utah and now pending in the Tenth Circuit Court of Appeals, the issue is whether and to what extent an Indian retailer may be required to collect a state sales tax in the area involved herein. The resolution of that question will require a determi-

nation of whether the area has remained an Indian reservation or whether the reservation was partially disestablished by Congress. See *Moe* v. *Confederated Salish and Kootenai Tribes,* 425 U.S. 463 (1976).

In *Ute Indian Tribe* v. *State of Utah, et al.,* Civil No. C-75-408, pending in the U.S. District Court, District of Utah, the Tribe seeks a declaratory judgment fixing the boundaries of its reservation, squarely raising the disestablishment question.

The fact that the State is an interested party when reservation status is in question is amply illustrated by the participation of other states in previous cases of this type before this Court. Moreover, the various contexts in which this issue has arisen show that the issue is crucial to the functioning of state government. *DeCoteau* v. *District County Court,* and *United States ex rel. Feather* v. *Erickson,* 420 U.S. 425 (1975) (state neglected and dependent child proceeding and state criminal law); *Mattz* v. *Arnett,* 412 U.S. 481 (1973) (enforcement of state criminal law); *Seymour* v. *Superintendent,* 368 U.S. 351 (1962) (enforcement of state game law). The two pending federal cases noted above in which the State of Utah and the Ute Tribe are parties further illustrate this point.

In addition to the strong governmental interests illustrated by these cases, special needs require that the State take action in the present case. In *Ute Indian Tribe* v. *State Tax Commission,* mentioned above, federal District Judge Willis Ritter did not call for briefs on the question of whether Acts of Congress had disestablished the reservations but simply entered an order that seems to re-establish the original boundaries

of the two original reservations as the present reservation boundaries.

In addition, in *Ute Indian Tribe* v. *State of Utah, et al.,* the case presently in the District Court, Judge Ritter enjoined the State and county defendants from exercising any criminal or civil jurisdiction based upon the decision of the State Supreme Court herein. Thus, by seeking a refund of taxes paid to the State, the Tribe has been able to obtain an order that appears to resurrect the boundaries of two former reservations. And by filing a suit to formally reestablish these original boundaries, the Tribe has been able to enjoin the exercise of State jurisdiction in areas in which it has been consistently exercised for decades.

At the same time, the Tribe, through its newly enacted Law and Order Code, claims full jurisdiction over non-members throughout the area encompassed by the original reservation boundaries. The Tribe asserts jurisdiction over "*any* person residing, located or present within the Reservation," for *any* civil or criminal action. Law and Order Code, § 1-2-3.[1] The disputed area over which the Tribe now asserts this jurisdiction is almost entirely fee land owned by non-Indians and has a population which is over 90% non-Indian.

The State of Utah recognizes that the tracts within the original boundaries of the two original reservations which are still held in trust, either for individual

[1] The recently enacted Law and Order Code of the Tribe not only claims the above noted additional territorial jurisdiction and expanded civil jurisdiction, but also claims complete misdemeanor and felony jurisdiction, including the major crime of criminal homicide The concern and unrest caused by the enactment of this Code is discussed in Appellee's Motion to Dismiss.

Indians or for the Tribe, are Indian country and are subject to exclusive federal and tribal jurisdiction. This is precisely the same situation which exists in the area in question in *DeCoteau, supra.* The State also recognizes the Indian country status of a contiguous tract of approximately 500,000 acres which Congress reserved for exclusive Indian use in 1948. But the State does not concede the Tribe's claim that the present Uintah and Ouray Reservation includes all of the land, both fee patented and trust, within the original boundaries of the former Uintah and Uncompahgre Reservations.

The State of Utah is cognizant of this Court's recognition of a responsibility to protect Indian rights in real reservation situations such as those involved in *Kennerly* v. *District Court of Montana,* 400 U.S. 423 (1971), *McClanahan* v. *Arizona Tax Commission,* 411 U.S. 164 (1973), *Williams* v. *Lee,* 358 U.S. 217 (1959) and other cases. But those situations are much different from the present case in which a tribe seeks to have two former reservations, long regarded as disestablished by Congress, returned to reservation status by court decree. In the above cases, the reservations were never the subject of disestablishment statutes such as are involved here.

QUESTION PRESENTED

Whether the area in which the incident herein occurred, which was within the boundaries of the original Uintah Indian Reservation, is presently still Indian country, or whether acts of Congress disestablished the Uintah Reservation, leaving the area no longer within a reservation boundary and no longer Indian country.

ARGUMENT

I. THE COURT BELOW CORRECTLY HELD THAT THE AREA IN QUESTION IS NO LONGER WITHIN RESERVATION BOUNDARIES

A. The Uintah Reservation Was Expressly Partially Disestablished by Acts of Congress.

With respect to the area in which the incident giving rise to this case occurred, the Utah Supreme Court correctly ruled that the original reservation had been disestablished by Congress. The difference between the area involved and the present Uintah and Ouray Reservation is explained by a history of the area.

Originally, two separate reservations were established in Utah for the bands which now comprise the Ute Indian Tribe. The Act of May 5, 1864, 13 Stat. 63, established the Uintah Reservation in the Uintah Valley for Indians in the Utah Territory. Eighteen years later, an Executive Order established the Uncompahgre Reservation, partially adjacent to the Uintah Reservation, for the Uncompahgre Utes who were being relocated from Colorado. Exec. Ord. of January 5, 1882, 1 Kappler 901.

The two reservations were each partially disestablished. Allotments were made to the Uncompahgres, as contemplated in their relocation treaty,[2] and the surplus lands were opened to settlement by the Act of June 7, 1897, 30 Stat. 62, 87. Subsequent legislation consistently referred to the area as the "former Uncompahgre Reservation."[3]

---

[2] Act of June 15, 1880, 21 Stat. 199.

[3] Act of March 1, 1899, 30 Stat. 924, 940-941; Act of March 3, 1903, 32 Stat. 982, 997; Act of April 30, 1908, 35 Stat. 70, 95; Act of March 11, 1948, 62 Stat. 72.

Early legislation authorizing negotiations for the Uintah Reservation was not carried out,[4] or failed because the negotiations were unsuccessful. In 1902 legislation, Congress set a definite date by which the allotments were to be made and "on which date all the unallotted lands within said reservation shall be restored to the public domain." Act of May 27, 1902, 32 Stat. 245, 263. However, the Act was conditioned on the consent of the Indians, and such consent could not be obtained. In 1903, this Court handed down its decision in *Lone Wolf* v. *Hitchcock,* 187 U.S. 553 (1903), confirming that Congress had plenary power and full legislative authority over tribal relations and property, and holding that the consent of Indians to the disposition of their reservation was not necessary. Following this decision, Congress specified another date on which the reservation was to be opened. Act of March 3, 1903, 32 Stat. 982,997. After additional postponement to allow time for the making of allotments, the reservation was declared " 'restored to the public domain' " and opened "under the homestead laws" in 1905. Presidential Proclamation of July 14, 1905, 34 Stat. 3119. Beginning in 1906, subsequent legislation consistently referred to the area as the "former Uintah Reservation."[5] In 1957, the Court of Claims used the same terminology in a case in which the Indians sued for

---

[4] Act of August 15, 1894, 28 Stat. 286, 337; Act of June 4, 1898, 30 Stat. 429. Congress inquired into the failure of the executive branch to act under this legislation. 30 Con.Rec. 614, 55th Cong., 1st Sess., April 6, 1897; S.Doc. 32, 55th Cong., 1st Sess., April 13, 1897.

[5] Act of June 21, 1906, 34 Stat. 325, 375; Act of April 30, 1908, 35 Stat. 70, 95; Act of April 4, 1910, 36 Stat. 269, 285; Act of March 3, 1911, 36 Stat. 1058, 1074; Act of July 20, 1912, 37 Stat. 196; Act of May 14, 1920, 41 Stat. 599.

compensation for a portion of the Uintah Reservation that had been incorporated into the Uintah National Forest at the time of the disestablishment. *Uintah and White River Bands of Ute Indians* v. *United States,* 139 Ct.Cls. 1, 2-3 (1957).[6]

A grazing reserve was set aside out of the Uintah Reservation to be held in common by the Indians. Joint Resolution 31, June 19, 1902, 32 Stat. 744. The Uintah Agency was combined with the Ouray Agency at the former Uncompahgre Reservation (named for Chief Ouray of the Uncompahgres) to form the Uintah and Ouray agency, and this agency continued Government services to the Indian population of the area, as in *DeCoteau, supra.* Over the next 40 years, the commonly held grazing tract and the trust allotments in the area were sometimes referred to as the "Uintah and Ouray Reservation," the name coming from the name of the agency, although no act of Congress had used this term.

In the Act of March 11, 1948, 62 Stat. 72, Congress set aside a tract of approximately 500,000 acres as an "extension" of the Uintah and Ouray Reservation. This Act delineated a contiguous boundary line, without any reference to the two original reservations. This indicates that the reservation being "extended" was not the two original reservations, but only the

[6] The Interior Department considered the area to be subject to state jurisdiction after the opening proclamation. In 1926, the Indian Field Service at Albuquerque informed the Commissioner of Indian Affairs in Washington of the status of non-trust land in the area:

> The Uintah reservation was opened for settlement some years ago, and the State laws govern in such territory.

Significantly, Appellant cites no cases or rulings in support of his position on Indian country status.

remaining tracts still held in trust for the Tribe or for individual Indians. As stated above, the State recognizes the Indian country status of these trust tracts and the entire area within the contiguous boundary line set by the 1948 Act.

The purpose of the 1948 Act was stated as follows:

> The Department of the Interior has long been convinced of the necessity for establishing this reservation as a permanent reserve for the Indians exclusively . . .

H.R. Rep. 1372, 80th Cong., 2d Sess., February 12, 1948, p. 2. It was felt that a fairly large, contiguous reservation area would be beneficial. Had the original Uncompahgre and Uintah Reservations not been disestablished, there would have already been a reservation of about three million acres. This Act, therefore, confirms what the effect of the earlier Congressional action had been.

Even more precise confirmation comes from the fact that over 50% of the land in the 1948 extension was described as land that had been in the "former Uncompahgre Reservation."[7] Obviously, if the Uncompahgre Reservation was not disestablished by the surplus land act which opened it, there would have been no need to put land from that reservation into an Indian reservation in 1948.

It is the Tribe's position in the pending federal cases cited above that it has jurisdiction over the entire area within the original boundaries of the Uintah Reservation and the original boundaries of the Uncompahgre

[7] H.R.Rep. 1372, 80th Cong., 2nd Sess., February 12, 1948, p. 6. The 1948 Act on its face expressly referred to the "former Uncompahgre Reservation." Jurisdictional Statement, p. A21.

Reservation, as well as the area within the line established by the 1948 Act (which overlaps with much of the Uncompahgre boundary). The Tribe denotes all three of these areas as the present Uintah and Ouray Reservation. The incident herein occurred off of trust land and within the original Uintah Reservation boundary. Technically, only the statutes affecting the Uintah Reservation disestablishment are relevant here.

The Uintah disestablishment was the culmination of a series of Acts of Congress. Unlike the situation in *Mattz* v. *Arnett, supra,* however, there was no congressional opposition which required changes in the legislation. Here the need for additional legislation was due at first to the fact that congressional directives aimed at disestablishing the reservation were simply not carried out, and later to the fact that considerable time was needed to actually make the allotments.

Significantly, however, the principle Act, under the authority of which the opening Proclamation was issued, stated on its face that "all the unallotted lands within said reservation shall be restored to the public domain." Act of May 27, 1902, 32 Stat. 263, Jurisdictional Statement, p. A29. This Court has stated that the phrase "vacated and restored to the public domain" is "clear language" of express disestablishment. *Mattz, supra,* 412 U.S., at 504 n. 22. In *DeCoteau, supra,* the public domain language did not appear on the face of the Act, but this Court deemed it significant that the sponsors of the legislation stated repeatedly that the lands would be returned to the public domain. 420 U.S., at 446. This provision is completely inconsistent with continued reservation status, and is persuasive evidence that disestablishment of the reservation boundary was intended.

B. The Surrounding Circumstances and Legislative History Confirm the Congressional Intent to Disestablish.

In addition to the "clear language" of express disestablishment on the face of the 1902 Act, the relevant legislative history and surrounding circumstances amply support the result reached by the court below, under the analysis which this Court has applied in *DeCoteau, Mattz* and *Seymour.* In *Ute Indian Tribe* v. *State Tax Commission,* the State, in a brief of extended length filed in the Tenth Circuit, has set forth the legislative history in the manner in which it was discussed in *DeCoteau.* A short sampling of references to that legislative history confirms that the congressional intent of the Uintah legislation was as held by the court below.

As in *DeCoteau,* the judicial task here is the "narrow" task of determining the intent of Congress at the time of the legislation in question. 420 U.S., at 449. At that time, the policy of § 5 of the General Allotment Act of February 8, 1887, 27 Stat. 388, was considered the ideal reconciliation of two governmental objectives. These were promoting Indian welfare by breaking up tribally held reservations into individually owned allotments, and making more land available for homesteading by restoring surplus lands to the public domain. As early as 1894, Congress began to apply this policy to the Uintah Reservation:

> If the consent of the Indians upon the Uintah Reservation can be obtained, by which they will accept allotment of lands in severalty, and the remainder of the lands is sold and the proceeds derived are used for the benefit of the Indians, their condition will be much better than it is at present.

H.R. Rep. 660, 53rd Cong., 2nd Sess., April 4, 1894.

Hearings concerning the Uintah Reservation, held while Congress was considering the 1902 "public domain" Act, contain the following comment on the Uintah legislation by the Commissioner of Indian Affairs:

> Commissioner JONES. I can not go into the details of it, Mr. Chairman, but generally speaking I am in favor of a bill of this character. I do not believe in reserving large tracts of land for the exclusive use of Indians.

S. Doc. 212, 57th Cong., 1st Sess., February 22, 1902, p. 4.

In the 1903 Indian Appropriation Act of March 3, 1903, 32 Stat. 982, Congress supplemented the 1902 Act with the provision that the Uintah Reservation would be restored to the public domain even if the Indians did not concur. In the debate on this Act, the universal acceptance of the disestablishment policy was stated by the Chairman of the House Committee on Indian Affairs as follows:

> The gentleman from Ohio suggests as a second step forward to do away with the reservation. He is in accord with the chairman in that regard, with the Indian Rights Association, with the board of Indian commissioners, with the Mohonk conference, with the Indian Office, with the Committee on Indian Affairs.

36 Cong. Rec. 1281, 57th Cong., 2nd Sess., January 26, 1903. In the debate on the 1903 Act, Rep. Sutherland of Utah, later an Associate Justice of this Court, made a specific reference to the effect of this legislation on the actual boundary of the reservation. The Congressman made the following objection to an appropriation

to resurvey the southern and western boundary lines of the Uintah Reservation to settle a standing dispute in the area:

> If the Uintah Reservation is opened, which I believe it will be, this appropriation of $6,000 for reestablishing the boundary lines of the reservation is entirely useless. The boundary lines have been in their present condition for many years, and if by any mischance the reservation should not be opened it will not hurt to let it wait for another year; and if the reservation is opened it is simply an appropriation of $6,000 without any useful purpose whatever.

36 Cong. Rec. 1388, 57th Cong., 2nd Sess., January 28, 1903. The statement that the bounday line would be meaningless after the Act went into effect was not questioned by other Congressmen who joined in the discussion. Clearly the Uintah legislation was intended to disestablish the reservation.

The final attempt at negotiating the Indians' consent took place shortly after the 1903 Act was passed. As in *DeCoteau,* the transcript of the negotiations reveals that the Indians perceived the legislation as effecting a disestablishment of their reservation and as abolishing the original reservation boundary. The transcript contains numerous statements by members of the Tribe such as the following:

> We are not going to give up any of this reservation away, nor have it cut in little pieces. It is ours, and we are going to keep it. We know our reservation line, and the White Man knows it.
>
> We do not want this reservation line changed in any way.
>
> Our land here is just as if fenced around with iron and we do not want to break it now.

> There has been a line run around this reservation and I do not want it broken . . .
>
> The line is laid around this land and there is no one who can come in upon it.

Council Transcript, pp. 14, 17, 18, 30, 39. The Government negotiator, Inspector James McLaughlin, confirmed their perception of the legislation:

> You say that line is very heavy and that the reservation is nailed down upon the border. That is very true as applying to the past many years and up to now, but congress has provided legislation which will pull up the nails which hold down that line and after next year *there will be no outside boundary line to this reservation.*

Council Transcript, p. 42 (emphasis added). Thus the surrounding circumstances and legislative history, as well as the subsequent legislation, confirm the intent of Congress to disestablish the reservation boundary which intent is contained in the 1902 Act itself and the 1905 Proclamation.

C. The Reservation Boundaries Were Disestablished on the Date the Reservation Was Proclaimed Opened by Presidential Proclamation.

The method used to compensate the Indians for the surplus lands was to place the proceeds of sales to homesteaders in trust for the benefit of the Indians. This is different from the payment of a specified sum in trust by the United States immediately, which was done in *DeCoteau.* This method of payment, however, does not constitute a bar to reservation disestablishment as an absolute rule, or this Court would have so held in *Mattz* and *Seymour, supra.* Instead, the Court in those cases found that the acts on their faces were not clearly

determinative of congressional intent and looked to the legislative history.

The legislative history in the present case shows that the change in method of payment clearly did not signify any change in congressional intent. In the Uintah legislation patterned after § 5 of the General Allotment Act, the House, by amendment, changed the method of payment to be used. 31 Cong. Rec. 5156, May 24, 1898. When the Senate considered the amendment, it was explained as follows:

> Mr. RAWLINS. I move that the Senate concur in the amendments of the House of Representatives to the bill. The amendments made by the House of Representatives do not materially change the bill.

31 Cong. Rec. 5183, May 25, 1898.

The Eighth Circuit has held that the change in method of payment which occurred at this time was not related to any change in congressional intent regarding disestablishment of boundaries, when presented with an even more extensive legislative history on the subject in *Rosebud Sioux Tribe* v. *Kneip,* 521 F.2d 87 (8th Cir. 1975), cert. granted, 425 U.S. 989.

The delayed or uncertain-sum method of payment may make a difference in cases where the issue is what interest the Indians may have retained after the opening, or where the issue is on what date all Indian interest ceased. But it is not relevant to the question of whether or when the reservation was disestablished.

The landmark case which states that the Indians retained a "lingering beneficial interest" because of the delayed payment provision is *Ash Sheep Co.* v. *United*

States, 252 U.S. 159 (1920). But even in that case it is clear that the portion of the reservation involved was disestablished and new, smaller reservation boundaries replaced the original boundaries.[8]

The separateness of the property question and the reservation status question is illustrated by a comparison of two cases. In *United States* v. *Creek Nation,* 295 U.S. 103 (1935), the question was the exact time at which title was transferred in a taking which resulted from a surveyor's error. A portion of Creek land was mistakenly included as part of a tract ceded by another tribe, allotted and opened for settlement. The Court held that the taking occurred not at the time of the survey, but at the time patents were issued for the lands. Thus the Indians retained an interest in the land, which in that instance they owned in fee, until the United States conveyed title to someone else. By contrast, in *United States* v. *Southern Pacific Transportation Co.,* 543 F.2d 676 (9th Cir. 1976), the question was when disestablishment had occurred, since a right-of-way arose when lands were no longer "within the limits of" any reservation. In that case, the Ninth Circuit held that the surplus land act had disestablished the reservation boundary, and that disestablishment occurred on the date of the Presidential Proclamation issued pursuant to the act. *Southern Pacific, supra,* 543 F.2d., at 696. Regardless of any property

[8] The Act involved in *Ash Sheep* mentioned new boundary lines in five separate places on its face. Act of April 27, 1904, 33 Stat. 352, 359, 360. For instance, § 4 provided that "new boundary lines" would be surveyed according to the Act and "permanently marked in a plain and substantial manner by prominent and durable monuments." Of course, the disestablishment here, as in *DeCoteau,* was of the entire reservation, so there was no new boundary line to be marked.

interest the Indians may have retained in the surplus lands until patents were issued to homesteaders, the reservation boundary line was dissolved and reservation status of unallotted and unreserved lands ceased on the date the land was proclaimed restored to the public domain by the Proclamation.[9]

Thus in *DeCoteau* allotments were made even after the passage of the Act, up until the reservation was actually proclaimed opened. But after the date of the Proclamation, special legislation would have been needed because the area was no longer within a reservation. Just such special legislation was, in fact, passed regarding the Uncompahgre Reservation because some Indians had been left without allotments on the date set for the opening. *See* Act of March 1, 1899, 30 Stat. 924, 940.

The Interior Department has also recognized that reservation boundaries may be disestablished by a sur-

[9] The question of when disestablishment took place was also at issue in *United States* v. *LaPlant,* 200 F. 92 (D.S.D. 911). In that case the question was whether state jurisdiction applied because the area was no longer "within the limits" of a reservation, or whether the fact that the land had not been homesteaded precluded state jurisdiction. The court held that disestablishment of the reservation had occurred at the time of the passage of the surplus land act or the proclamation pursuant thereto, rather than at the time of entry or payment by a homesteader. The complexity of the issue, however, is illustrated by the fact that the court used the word "title" to refer to the change that took place on that date of the proclamation rather than speaking of disestablishment or the dissolution of boundaries.

This Court in *United States* v. *Pelican,* 232 U.S. 442 (1913), clarified that the *LaPlant* holding for non-trust lands did not apply to trust allotments in an opened and disestablished area. The latter were still Indian country. This was codified in 18 U.S.C. 1151(c). *See DeCoteau, supra,* 420 U.S., at 446-447, citing *Pelican* with approval.

plus land act, on the date specified in the proclamation, even though the uncertain-sum method of payment was used. In a 1938 Opinion, the Department noted that numerous surplus land acts had used the uncertain-sum method and had also contained express language restoring the land to the public domain. These included the 1880 Ute Act in Colorado, which resulted in the relocation of the Uncompahgre band to Utah, and the 1889 Great Sioux Act, involving the western half of South Dakota. The Department held that undisposed of surplus lands could be restored to tribal ownership under the 1934 Indian Reorganization Act even though they were no longer within reservation boundaries, the reservations having been disestablished at the time of the legislation and proclamations. 56 I.D. 330 (1938).

D. The Plenary Power of Congress, as Recognized by This Court, Authorized the Disestablishing Legislation.

It is a fundamental principle of Indian law that Congress has full legislative power in the area of Indian affairs. *Cherokee Nation* v. *Hitchcock,* 187 U.S. 294 (1902); *Roff* v. *Burney,* 168 U.S. 218 (1897); *Stephens* v. *Cherokee Nation,* 174 U.S. 445 (1899); *Blackfeather* v. *United States,* 190 U.S. 368 (1903); *Choate* v. *Trapp,* 224 U.S. 665 (1912). "The plenary character of this legislative power over various phases of Indian affairs has been recognized on many occasions." *Board of Commissioners* v. *Seber,* 318 U.S. 705, 716 (1946).

This principle was applied to the question of whether consent was required for a surplus land act in *Lone Wolf* v. *Hitchcock,* 187 U.S. 553 (1903). Congressional debates even before *Lone Wolf* addressed this power in the surplus land context. S.Doc. 212, 57th Cong., 1st

Sess., February 22, 1902, p. 10. As noted above, the *Lone Wolf* decision settled the question before the Uintah legislation went into effect.

Treaties establishing reservations often provided that consent to a future cession of the land therein could be accomplished with the consent of a specified portion, such as three-fourths, of the adult males of the tribe. There was no such treaty with respect to the Uintah Reservation. Therefore, Congress determined that it would attempt to obtain the consent of a majority of the members. After the *Lone Wolf* decision, Congress again provided for negotiations to explain the Act and obtain majority consent if possible, although it set a date on which the reservation was to open regardless of the outcome of these negotiations. Act of March 3, 1903, 32 Stat. 982. Thus, while Congress fully exercised its plenary power, it consistently attempted to be as fair as possible to those affected, as contemplated by the *Lone Wolf* decision.

II. THE QUESTIONS WHICH APPELLANT CLAIMS ARE RAISED IN THIS APPEAL ARE NOT, IN FACT PRESENTED.

The holding of the court below was a simple one: An Act of Congress and a Presidential Proclamation pursuant to that Act "placed the land of the Indian Reservation not theretofore allotted to Indians back on the public domain." Jurisdictional Statement, p. A 3. Therefore the state courts had subject matter jurisdiction over the incident and personal jurisdiction over the Defendant because the area in question was no longer within an Indian Reservation. The fact that the court did not extensively cite from the legislative history of the disestablishing legislation discussed above is attributable to the manner in which the case has proceeded

and been presented to the court, and to the fact that the "public domain" language was contained on the face of the Act of March 27, 1902, 32 Stat. 263, which the court cited.

This holding made it totally unnecessary for the court below to go on to considerations of whether there was state jurisdiction because of 25 U.S.C. 1321-1326, the so-called "Public Law 280" jurisdiction. Public Law 280 dealt solely and expressly with the assumption of jurisdiction in "Indian Country." 25 U.S.C. 1321, 1322, 1326. The court below held that the area in question was not Indian country, because it was not, contrary to Appellant's position, within an Indian reservation. See 18 U.S.C. 1151. As in *DeCoteau,* any consideration of Public Law 280 would be begging the question.[10] The issue on which both courts below decided this case was the issue of whether the area in question is Indian country. Appellee cited the 1902 Act to both courts, and their disposition of the threshhold Indian country question precluded any possibility of Public Law 280 becoming relevant to the case. No question of jurisdiction pursuant to Public Law 280 was reached or decided. In order to give the impression that numerous substantial questions are involved in this case, however, Appellant has devised three "Questions Presented" which assert Public Law 280 issues. Indeed, two of these claim to be constitutional questions concerning the application of Public Law 280. Jurisdictional Statement, pp. 3, 4.

Appellee did not claim, nor does the State claim, and the court did not hold, that state jurisdiction existed by

[10] The fundamental error of the dissent below was that it considered the area to be Indian country, based solely on an affidavit of the superintendent of the local reservation agency, and went on to consider Public Law 280.

virtue of Public Law 280. Instead, Appellee and the State submit, and the court held, that state jurisdiction existed over the area in question just as it exists elsewhere in Utah, because the area in question is not Indian country.

The State of Utah has not at any time attempted to assert jurisdiction over the area in question and Indians therein on the basis of Public Law 280, 25 U.S.C. 1321-1326, or Utah Code Ann. 63-36-9 through 18. Any alleged issue involving the application of these statutes is pure fabrication. No controversy exists between the parties herein or between the State of Utah and the Ute Indian Tribe concerning these statutes.

Three of the four Questions Presented listed in the Jurisdictional Statement are based upon the claimed application of Public Law 280. The remaining question listed is based on the premise that "the Utah Supreme Court has declared that the Congressionally recognized Ute Indian Tribe no longer exists and that the members of the Tribe no longer have an interest in their reservation lands or immunities resulting therefrom." Jurisdictional Statement, p. 4. Appellant repeatedly claims that the court below ruled that "neither the Ute Tribe nor the Uintah and Ouray Reservation now exists." Jurisdictional Statement, p. 19. In support of these claims, Appellant only cites the following statement from the opinion:

> The Ute nation, of the long-ago treaty, no longer exists, and the descendants of the inhabitants of that nation are now citizens of the United States.

Jurisdictional Statement, p. A4. Appellant focuses on this discussion of treaty rights, and ignores the portion of the opinion in which the court states the issue:

> The sole question presented on this appeal is whether or not the district courts of the State of

> Utah have jurisdiction over *enrolled members of the Ute Indian tribe* within the area. . . .

Jurisdictional Statement, p. A2 (emphasis added). Contrary to the claim made by Appellant, the Utah Supreme Court clearly and explicitly recognized the continuing existence of the Ute Indian Tribe. The court recognized the status of Appellant as an enrolled member of the Tribe.

Appellant also claims that the court below held that the Uintah and Ouray Reservation no longer exists, also based on the above statement. Jurisdictional Statement, p. 10. In fact, the court only held that the area involved, which was within the original Uintah Reservation, was no longer Indian country because the Uintah Reservation was disestablished. The court made no comment, even in dicta, about the present Uintah and Ouray Reservation, which is located near the former Uintah Reservation and largely within the former Uncompahgre Reservation.

It is not the position of the State of Utah that this decision or anything else holds that the Uintah and Ouray Reservation no longer exists. But it is the State's position that the present Uintah and Ouray Reservation does not coincide with the original boundaries of the former Uintah Reservation.

Any other statements the court below may have made about Indian property rights or treaty rights, or constitutional considerations that may result from the exercise of state or tribal jurisdiction, are not part of the holding of the case. No fact situations involving these questions are present, and no controversy exists as to them, either between the parties or between the State and the Ute Indian Tribe.

III. THE DECISION BELOW IS NOT PROPERLY SUBJECT TO APPEAL TO THIS COURT.

The erroneous statements of Questions Presented lead Appellant to claim a right of appeal to this Court under 28 U.S.C. 1257 (1). Appellant argues that the decision below was against the validity of 25 U.S.C. 1322(a) and 1326. As explained above, however, the decision below did not and could not have dealt with those statutes. Appellant also argues that the decision invalidates various acts of Congress which recognize the existence of the Ute Indian Tribe and the Uintah and Ouray Reservation. As shown above, however, the court below specifically recognized the existence of the Tribe and did not address the Uintah and Ouray Reservation. Thus the asserted basis for appeal, the invalidation of federal statutes, is not present. Any question of statutory invalidity in this case is "too tangentially involved" to satisfy the requirement of 28 U.S.C. 1257. *Garrity* v. *State of New Jersey*, 385 U.S. 493 (1967).

An appeal improvidently taken may be regarded as a writ of certiorari. 28 U.S.C. 2103. When this is done, the Court can only consider the federal questions actually passed upon by the state court. *Wilson* v. *Cook*, 327 U.S. 474 (1946). As noted, the court did not pass upon the questions raised by Appellant.

The considerations which warrant the grant of plenary certiorari jurisdiction are not present here. There is at present no clear conflict between the state court and the Court of Appeals since the latter has not yet handed down its ruling on the disestablishment question. There are no significant constitutional or statutory questions other than the intent of the disestablishing statutes themselves. This Court has set

down adequate standards for the determination of Congressional intent in such cases. *DeCoteau, supra; Mattz, supra.* *DeCoteau* was the foundation of the opinion below. However, should this Court decide to exercise its power to hear this case, the State does appreciate the fact that an authoritative resolution to the conflict between the rulings of the United States District Court and what had been the status quo, as reflected by the decision herein, would be more speedily obtained. This would help alleviate the animosity caused by the Tribe's assertion of expanded personal, territorial and subject matter jurisdiction.

CONCLUSION

The decision sought to be appealed correctly held that the Uintah Reservation was disestablished in 1905, and that the non-trust lands within the original boundaries of that reservation are now no longer within a reservation and, therefore, are not Indian country. The Uintah legislation, and the surrounding circumstances and legislative history of that legislation, reveal that this was the intent of Congress.

The State of Utah, as *amicus curiae,* respectfully requests that this Court dismiss this appeal.

Respectfully submitted,

H. WRIGHT VOLKER
Assistant Attorney General
State of Utah
State Capitol Building
Salt Lake City, Utah

EARL R. METTLER
Special Assistant Attorney General
State of Utah
231 C Street, N.E.
Washington, D. C.

Attorneys for Amicus Curiae